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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6607

COMPLAINT FILED: July 17, 2012

LAST RESPONSE RECEIVED: Aug. 8, 2012

ACTIVATED: Sept. 18, 2012

EARLIEST SOL: Sept. 6, 2016

LATEST SOL: Apr. 15, 2017

COMPLAINANT:

Tulsi Gabbard

RESPONDENTS:

Muliufi F. "Mufi" Hannemann

Hannemann for Congress and Colin Ching
in his official capacity as treasurer¹

Hawai'i Lodging & Tourism Association

RELEVANT STATUTES:

2 U.S.C. § 434(b)

2 U.S.C. § 439a

2 U.S.C. § 441a(a)(7)(B)

2 U.S.C. § 441b(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The primary allegations in this matter stem from Muliufi F. "Mufi" Hannemann's activities as the president and Chief Executive Officer of the Hawai'i Lodging and Tourism Association ("HLTA") while running for the U.S. House of Representatives. The Complaint alleges that HLTA made prohibited in-kind contributions to Hannemann's campaign committee, and that the campaign committee failed to properly report various campaign-related expenditures. Respondents generally deny most of the allegations, but acknowledge two minor reporting violations.

¹ On February 22, 2013, Hannemann for Congress submitted an amended Statement of Organization naming Colin Ching as its new treasurer in place of Mary Patricia Waterhouse. Statement of Organization (Feb. 22, 2013).

As explained below, we recommend that the Commission dismiss the allegations that HLTA, Hannemann, and his campaign committee violated 2 U.S.C. § 441b(a) by making or accepting corporate contributions and dismiss the allegations that Hannemann's campaign committee violated 2 U.S.C. § 434(b).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Hannemann was an unsuccessful candidate in the August 11, 2012, Hawaii primary election for the Democratic nomination for the state's Second Congressional District. His principal campaign committee is Hannemann for Congress, and Colin Ching is its current treasurer (collectively, the "Committee"). Hannemann and the Committee filed Statements of Candidacy and Organization on September 6, 2011.

HLTA is a "non-profit, statewide trade organization of lodging properties, lodging owners and management firms, suppliers, and related firms and individuals." HLTA Resp. at 1 (Aug. 8, 2012). Its mission is to "provide advocacy and education for the hospitality industry." *Id.* It incorporated as a non-profit corporation in 1947, and is registered with the Internal Revenue Service ("IRS") as a section 501(c)(6) association. See Hawaii Department of Commerce and Consumer Affairs; 2009 IRS Form 990.²

Hannemann was the president and CEO of HLTA from January 2011 until his resignation, effective July 8, 2012. The Complaint's allegations concern the period during which Hannemann was both a federal candidate and president and CEO of HLTA, and fall into three broad categories: (1) travel; (2) HTLA activities and salary; and (3) reporting of expenditures.

² Before October 1, 2011, HLTA conducted business under the name "Hawai'i Hotel & Lodging Association." Accordingly, its 2009 Form 990 was filed under this name.

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1 1. Travel

2 The Complaint alleges that the Committee violated the Federal Election Campaign Act of
3 1971, as amended, (the "Act") by failing to report expenditures for Hannemann's campaign
4 travel. Hannemann traveled extensively during the period when he was both a congressional
5 candidate and the president and CEO of HLTA. Hannemann asserts that this travel "was paid in
6 conjunction with his business responsibilities as president and CEO of [HLTA], which has a
7 chapter in each of the four counties." Comm. Resp. at 1 (Aug. 8, 2012). HLTA states that
8 "[Hannemann's] duties and goals required that he travel frequently to each of the state's islands
9 for a variety of purposes." HLTA Resp. at 1.

10 On September 15, 2011, the Committee sent an e-mail to its supporters stating that, "over
11 the past few weeks, our campaign has traveled to every county of the state . . ."³ Compl. ¶ 5,
12 Ex. A. Additionally, a local news blog, the *Honolulu Civil Beat*, reported on a March 21, 2012,
13 fundraiser hosted by Hannemann in Guam, but the Committee's 2012 April Quarterly Report
14 does not disclose any disbursements for travel to Guam. Compl., Ex. E.

15 The Committee did not disclose any disbursements for travel on its 2011 October
16 Quarterly Report, and the Committee disclosed what the Complaint asserts are only some of its
17 travel disbursements on its 2011 Year End Report. See 2011 October Quarterly Report; 2011
18 Year End Report; Compl. ¶ 6.

19 The Committee acknowledges that its September 15, 2011, e-mail could be
20 "misconstrued as major [campaign] activity," but asserts that "what actually happened was Mr.

³ Around the same time, various news sources and Hannemann's personal Twitter account, <https://twitter.com/MufiHannemann>, began reporting on Hannemann's intra-state travel. For example, on August 23, 2011, the *Hawaii Tribune Herald* reported that "former Honolulu Mayor Mufi Hannemann" was in attendance at "a political event" in Hilo, and on September 16, 2011, the *Garden Island News* reported that Hannemann "distributed checks to non-profits on Kauai." Compl., Ex. C (listing contemporaneous press and twitter references to travel). Hannemann's personal Twitter account details his travel to events such as the Hawaii County Fair (Sept. 17, 2011) and the Molokai Christmas Lights Parade (Dec. 3, 2011). *Id.*

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1 Hannemann met or called on some supporters in each county while there on business or personal
2 travel." Comm. Resp. at 1. The Committee characterizes Hannemann's campaign activity as
3 "incidental" to his business or personal travel: "Insofar as Mr. Hannemann was on a particular
4 island for non-campaign purposes, and incurred no costs in meeting or calling his friends, the
5 campaign did not incur any reportable expenses." *Id.*

6 Regarding the March 21, 2012, Guam fundraiser in particular, the Committee asserts that
7 Hannemann used his own personal airline miles to pay for his round-trip airfare and the
8 Committee paid for his hotel accommodations (as well as the event itself) at Fiesta Resort Guam.
9 *Id.* at 2. The Committee's 2012 April Quarterly Report discloses a March 30, 2012,
10 disbursement of \$1,169.20 made to Fiesta Resort Guam.

11 2. HLTA Activity and Salary

12 During the period in which he was both a federal candidate and the paid president and
13 CEO of HLTA, Hannemann appeared as an HLTA spokesman: (1) on Channel 9's "Hawaii
14 News Now" morning shows, on a regular basis; (2) in televised public service announcements
15 ("PSAs") paid for by HLTA; and (3) in a full-page advertisement in the *Honolulu Star-*
16 *Advertiser* on July 6, 2012, promoting the "Visitor Industry Charity Walk." Compl. ¶¶ 9-10,
17 Ex. I. The Complaint alleges that these appearances resulted in the Committee accepting
18 prohibited corporate contributions from HLTA. Compl. ¶¶ 9-10.

19 HLTA responds that, as the president and CEO of HLTA, Hannemann was "charged
20 with . . . serving as an advocate and spokesman for the lodging and visitor industries [and]
21 communicating our mission and goals to the general public." HLTA Resp. at 1; *see also* Comm.
22 Resp. at 2-3. The Committee maintains that the advertisements and news appearances were

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1 essential to his duties and that he had been making these announcements and appearances since
2 he took the position in January 2011.⁴ Comm. Resp. at 2.

3 The Complaint also alleges that HLTA's payment of Hannemann's salary while he was
4 "campaigning full-time" constitutes a prohibited corporate contribution from HLTA, speculating
5 that Hannemann was "certainly not working the same number of hours." Compl. ¶ 9. In

6 response, the Committee asserts this allegation is not supported by any facts. Comm. Resp. at 3.

7 The Response claims that HLTA's Board of Directors would have asked Hannemann to resign if
8 he were not fulfilling his duties, and references an editorial written by HLTA's chairman of the
9 board titled, "Hannemann Championed Tourism at a Critical Time." Cmte. Resp. at 3, Ex. B.

10 According to HLTA, "as far as the HLTA Board of Directors is concerned, Mr. Hannemann did
11 an exceptional job as president and CEO throughout his 16-month tenure. He never failed to
12 fulfill his responsibilities and worked tirelessly on HLTA business affairs. . . ." *Id.*

13 3. Failure to Properly Report Expenditures

14 The Committee has filed regular disclosure reports since its formation. The Complaint
15 alleges that the Committee failed to properly disclose expenditures for polling and credit card
16 payments. Compl. ¶¶ 11-12.

17 The Honolulu firm QMark Research ("QMark") conducted two polls for the Committee
18 — one in late August 2011 and another in late January 2012 — as part of a "two-poll package."
19 Comm. Resp. at 3. The Committee states that it subsequently made two payments to QMark of
20 \$5,130.89 each on March 29 and April 21, 2012. *Id.* These are disclosed on the Committee's
21 2012 April Quarterly and July Quarterly Reports. The Complaint alleges that: (1) this amount is

⁴ It appears that Hannemann had been appearing periodically on "Hawaii News Now" at least as early as July 10, 2011, and writing a regular "Tourism Matters" column for *Midweek* since April 2011. See, e.g., *Mufi Hannemann and Charles Djou Talk Rail Across the Aisle*, Hawaii News Now (CBS television broadcast July 10, 2011), <http://www.youtube.com/watch?v=H5Fuski95MM>; Mufi Hannemann, *Tourism, Education Go Together*, MIDWEEK, Apr. 20, 2011.

1 "clearly under the market value for such polling services;" and (2) the Committee failed to report
2 a disbursement for a QMark poll conducted between July 28 and August 1, 2011, on its 2011
3 October Quarterly Report. Compl. ¶ 11, Ex. H.⁵ As to the polls' market value, the Committee
4 asserts that the Complaint's allegation that they are worth more than \$10,261.78 is "completely
5 without merit," and "seems to have been made without any knowledge of the scope of the polls
6 in question, or the services actually offered." Comm. Resp. at 3.

7 The Committee also disclosed three disbursements to First Hawaiian Bank with a listed
8 purpose of "Credit card payment — some memoed [*sic*] items under \$200" on its 2012 April
9 Quarterly Report: (1) \$880.29 on January 12, 2012; (2) \$9,023.75 on February 17, 2012; and
10 (3) \$1,743.21 on March 19, 2012. 2012 April Quarterly Report. Following each of these
11 disclosed disbursements is the itemization of the credit card payment, disclosed as disbursements
12 with the note "[MEMO ITEM]." *Id.* The Complaint alleges that the Committee failed to
13 properly itemize these expenditures. Compl. ¶ 12.

14 Regarding the disbursements to First Hawaiian Bank, the Committee acknowledges that
15 two credit card charges exceeding \$200 were inadvertently left off of the 2012 April Quarterly
16 Report. Comm. Resp. at 3. The Committee explains that it experienced a problem with the way
17 its reporting software extracted data about credit card payments that "cross quarters," but that the
18 Committee is now reviewing its credit card payments for past quarters and will amend the
19 relevant reports. *Id.* at 3-4. The Response also includes a detailed list of the associated charges
20 for each credit card payment at issue in this matter. Comm. Resp., Ex. C.

⁵ Exhibit H appears to be a summary of QMark's August 2011 poll, indicating that the poll consisted of 400 telephone interviews testing Hannemann's favorability score and his chances of winning the Democratic Primary and General Election. Compl., Ex. H.

B. Legal Analysis

A "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a federal election. 2 U.S.C. § 431(8). Commission regulations define "anything of value" to include in-kind contributions, including the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d). It is unlawful for any corporation to make a contribution in connection with any election to any federal office, and unlawful for any political committee knowingly to accept such a contribution. 2 U.S.C. § 441b(a).

The Act requires that political committees disclose the total amount of all receipts, including contributions from the candidate; the total amount of all expenditures made to meet candidate or committee operating expenses, including payments for campaign-related travel; and the amount and nature of outstanding debts and obligations owed by the committee. 2 U.S.C. § 434(b)(2), (4), (8).

1. Travel

Hannemann characterizes his campaign activity in the weeks leading up to the September 15, 2011, e-mail as "incidental" to his business travel on behalf of HLTA. *See supra* p. 4. Candidate travel that combines campaign activity with business activities not related to the campaign and personal activities ("mixed use travel") is subject to Commission regulations regarding both the personal use of campaign funds and expense allocation.

In cases where travel involves both personal and campaign activities, Commission regulations on personal use provide that the incremental expenses that result from personal activities are personal use, unless the person benefitting from the use reimburses the campaign

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1 account within 30 days for the amount of the incremental expenses. 11 C.F.R.

2 § 113.1(g)(1)(ii)(C).⁶

3 The Commission historically has considered the costs of airfare to travel to a single
4 location for mixed use to be "a defined expense" and not subject to the incremental expense
5 approach. See Advisory Op. 2002-05 (Hutchinson) at 5; Factual & Legal Analysis at 5, MUR
6 6127 (Obama for America). Applying 2 U.S.C. § 439a(b), the Commission has assessed whether
7 the expense would have occurred irrespective of the candidate's campaign to determine whether
8 airfare should be paid in full from personal or campaign funds. See F&LA, MUR 6127
9 (concluding that, because the President's travel to Hawaii would have occurred irrespective of
10 the campaign, he should have reimbursed his campaign for the airfare under § 439a(b));
11 Advisory Op. 2002-05 (concluding that the airfare of an official traveling for business, personal,
12 and campaign reasons would have occurred irrespective of any campaign activity and therefore
13 none of the airfare must be paid for by the campaign). But see Advisory Op. 2011-02 (Brown)
14 (Commission did not reach agreement on whether a candidate's publisher could pay the travel
15 costs for the candidate to both promote his book and hold fundraisers in the same city).

16 The statements posted on Hannemann's Twitter account — both cited in the Complaint
17 and others — paint a picture of Hannemann attending numerous events across the state in
18 support of the tourism industry, ranging from county fairs to birthday parties to the various
19 islands' HLTA-sponsored charity walks. See generally <https://twitter.com/MufiHannemann>;

⁶ In contrast, the regulations on expense allocation provide that, where a candidate conducts any non-incidental campaign-related activity in a stop, the entire stop is a campaign-related stop and travel expenditures made for that stop are reportable. 11 C.F.R. § 106.3(b). This regulation draws a distinction between a candidate chatting about his campaign with a few luncheon attendees after a non-campaign-related speech and a candidate asking for support during the course of an otherwise non-campaign related speech; while the former is not a campaign-related event, the latter is, and would require that travel costs be allocated and reported. Explanation and Justification, Disclosure Regulations, House Doc. No. 95-44, 50 (Jan. 12, 1977). Prior Commission decisions suggest that possible conflicts between the incremental approach at sections 439(a) and 113.1(g) and the cost allocation approach at section 106.3 should be resolved by giving precedence to sections 439(a) and 113.1(g). See Factual & Legal Analysis ("F&LA") at 5, MUR 6127 (Obama for America); Advisory Op. 2002-05 (Hutchinson) at 5.

1 Compl., Ex. C. Notwithstanding the Committee's September 15, 2011, e-mail, it appears that the
2 travel detailed in the referenced media sources would have occurred irrespective of
3 Hannemann's campaign. Although the *Hawaii Tribune* article cited in Complaint Exhibit C
4 references Hannemann attending a "political event in Hilo," there is no information that
5 Hannemann attended this event on behalf of his campaign rather than in his capacity as a party
6 leader and the former mayor of Honolulu. Similarly, the *Garden Island* article cited in the
7 Complaint detailing Hannemann's distribution of checks to local non-profits explains that
8 Hannemann was distributing funds raised by HLTA's 2011 Charity Walk.

9 Where Hannemann's Twitter account does suggest campaign-related travel — for
10 example, a tweet about a campaign kick-off event at the Jailhouse Pub and Grill in Kauai on
11 November 14, 2011 — it appears that the Committee disclosed the related disbursements: its
12 2011 Year End Report discloses a \$187.41 disbursement for inter-island travel on November 13,
13 2011, and a disbursement of \$613.21 to Jailhouse Pub on November 14, 2011.

14 In sum, the Committee's assertions that Hannemann's campaign activity was merely
15 "incidental" to his business obligations during most of his inter-island travel is substantially
16 corroborated by the public contemporaneous diary that he maintained as his Twitter account. It
17 also appears that the travel involving significant campaign activity was disclosed on the relevant
18 disclosure reports. Although we do not have all of the details of Hannemann's travel schedule
19 from September 6, 2011, to July 8, 2012, the available information suggests that the travel not
20 disclosed by the Committee would have occurred irrespective of Hannemann's candidacy, and
21 therefore did not need to be funded or reported by the Committee.

22 A definitive conclusion would require a detailed investigation into the booking and
23 scheduling of Hannemann's travel; however, such an investigation does not appear warranted in
24 light of the available information and the Commission's limited resources. We therefore

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1 recommend that the Commission dismiss both the allegation that HLTA, Hannemann, and the
2 Committee violated 2 U.S.C. § 441b(a) by making or accepting a corporate contribution in the
3 form of Hannemann's travel, and the allegation that the Committee violated 2 U.S.C § 434(b)(4)
4 by failing to report this travel.

5 2. HLTA Activities and Salary

6 a. News Show Appearances

7 Hannemann's appearances on Channel 9's "Hawaii News Now" morning shows were not
8 paid for by HLTA. Commission regulations exempt from the definition of "contribution" any
9 costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
10 station, unless the facility is owned or controlled by any political party, political committee, or
11 candidate. 11 C.F.R. § 100.73. The Commission conducts a two-step analysis to determine
12 whether this "press exemption" applies in a given situation: (1) it asks if the entity is a press
13 entity as described by the Act and regulations; and (2) it asks whether the press entity is owned
14 or controlled by a political party, political committee, or candidate, and, if not, whether the press
15 entity is acting as a press entity in conducting the activity at issue (whether it is acting in its
16 "legitimate press function"). See Advisory Op. 2005-16 (Fired Up!); *Reader's Digest*
17 *Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

18 In this matter, it appears that Channel 9's "Hawaii News Now" morning show is a
19 legitimate press entity acting in its legitimate press function; it is a broadcast station that does not
20 appear to be owned by any political party or committee, and its YouTube clips feature its
21 broadcasters interviewing various political figures, including Hannemann, about Hawaii's
22 tourism and economy. See *supra* note 4. Accordingly, the press exemption applies to
23 Hannemann's appearances on "Hawaii News Now" on behalf of HLTA, and neither Hannemann
24 nor the Committee received a contribution in the form of press coverage on "Hawaii News

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Now.” We therefore recommend that the Commission find no reason to believe that HLTA, Hannemann, or the Committee violated 2 U.S.C. § 441b(a) by making or accepting an in-kind corporate contribution in the form of press coverage.

b. Coordinated Communications

Hannemann appeared in several communications paid for by HLTA. *See supra* p. 4. Expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, the candidate’s authorized political committee, or their agents, are a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B). When a person pays for a communication that is coordinated with a candidate or his or her authorized committee, the communication is considered an in-kind contribution from that person to that candidate and is subject to the limits, prohibitions, and reporting requirements of the Act. 11 C.F.R. § 109.21(b).

A communication is coordinated with a candidate, authorized committee, or agent thereof if it meets the three-part test set forth in the Commission regulations: (1) it is paid for by a person other than the candidate or authorized committee; (2) it satisfies one of the five content standards in 11 C.F.R. § 109.21(c); and (3) it satisfies one of the conduct standards in 11 C.F.R. § 109.21(d). *Id.* § 109.21(a).

Although the Complaint alleges that certain PSAs featuring Hannemann constitute coordinated communications, it does not identify the PSAs or include any information concerning their timing, subjects, or content in support of this allegation.⁷ A determination of whether these PSAs satisfy the Commission’s test for coordinated communications would

⁷ While the Complaint states that the PSAs were “broadcast” and posted on Hannemann’s YouTube channel, Facebook page, and Twitter account, a review of these websites reveals only one PSA, posted on all three sites on May 10, 2012, featuring Hannemann inviting viewers to the 2012 Visitor Industry Charity Walk. *See, e.g.*, <http://www.youtube.com/watch?v=2e7vBh6PnPk&list=UU5Amc2VJmmIOmEf05pDN5sw&index=12>. These internet postings do not constitute “public communications,” and therefore do not in themselves satisfy the content prong. *See* 11 C.F.R. §§ 100.26, 109.21(c)(3). Furthermore, we are unaware of any evidence that the PSAs were “broadcast” outside these websites.

1 require investigation; the conclusory nature of the allegation, however, does not warrant
2 expending Commission resources to conduct such an investigation here.

3 The Complaint also alleges that a specific newspaper advertisement, which featured
4 Hannemann in relation to a charity event sponsored by HLTA, constitutes a coordinated
5 communication under the Commission's regulations. The available information supports the
6 view that the advertisement may satisfy the three-part test for coordination. First, the
7 advertisement was paid for by HLTA.⁸ Second, it satisfies the content prong in that it was a
8 public communication that clearly identified a federal candidate (Hannemann) and was
9 distributed on July 6, 2012, within 90 days of the August 11, 2012, primary election. See 11
10 C.F.R. § 109.21(c)(4). Finally, although the Complaint does not identify any specific activity to
11 meet the conduct prong, the fact that the candidate himself appears in the ad and was the
12 president and CEO of HLTA at the time it was published supports a reasonable inference that the
13 conduct prong is also satisfied. See 11 C.F.R. § 109.21(d)(2).

14 Pursuit of this allegation, however, would not be an efficient use of the Commission's
15 limited resources. The advertisement focuses entirely on promoting a charity event; it does not
16 "pertain[] to [Hannemann] . . . as a candidate." Statement of Reasons, Comm'rs Walther,
17 Petersen, Bauerly, Hunter, McGinn at 5, MUR 6020 (Alliance for Climate Protection)
18 (dismissing allegation of coordination where candidate appeared in a charitable organization's ad
19 that satisfied the content prong of the coordinated communications test). The ad features a chart
20 listing the total number of walkers and money raised on each island's walk, multiple photographs
21 of the participants from each island, and a "Save the Date" announcement for the 2013 Visitor
22 Industry Charity Walk. See Compl., Ex. I. While the advertisement includes a photograph of

⁸ Although we do not know the exact cost, the *Honolulu Star-Advertiser's* 2012 Retail Rate Card suggests that HLTA may have paid as much as \$8,280 for the advertisement. See *2012 Retail Rate Card* (Apr. 1, 2012), www.oahupublications.com/opi/2012-Star-Advertiser-Retail-Rates.pdf.

1 Hannemann, he is identified only as the "President and CEO" of HLTA, and he is standing
2 between two other individuals who are identified as the charity event's Honorary Chair and
3 Chair. *Id.* Given the philanthropic nature of the advertisement, we recommend that the
4 Commission exercise its prosecutorial discretion and dismiss the allegations that HLTA,
5 Hannemann, and the Committee violated 2 U.S.C. § 441b(a) by making or accepting a corporate
6 contribution in the form of coordinated communications.⁹ *See Heckler v. Chaney*,
7 470 U.S. 821, 831 (1985).

8 c. Salary

9 Commission regulations provide that compensation paid to a candidate by an employer
10 constitutes a contribution unless such payments are made irrespective of the candidacy, meaning:

- 11 1) the compensation results from *bona fide* employment that is genuinely independent of the
12 candidacy;
13
14 2) the compensation is exclusively in consideration of services provided by the employee as
15 part of this employment; and
16
17 3) the compensation does not exceed the amount of compensation which would be paid to
18 any other similarly qualified person for the same work over the same period of time.
19
20 11 C.F.R. § 113.1(g)(6)(iii).

21 The available information suggests that HLTA paid Hannemann's salary irrespective of
22 his candidacy. Hannemann obtained his position as president and CEO of HLTA approximately

⁹ There is not enough information available to determine whether the Commission's safe harbor for commercial transactions that serve non-electoral business and commercial purposes is applicable to this advertisement. *See Coordinated Communications*, 75 Fed. Reg. 55,947, 55,959 (Sep. 15, 2010). That safe harbor covers public communications in which: (1) a federal candidate is clearly identified only in his or her capacity as the owner or operator of a business; (2) the business existed prior to the candidacy; (3) the medium, timing, content, and geographic distribution of the public communication is consistent with public communications made prior to the candidacy; and (4) the public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office. 11 C.F.R. § 109.21(i). Specifically, we do not know whether the ad here "is consistent with public communications made prior to the candidacy." *Id.* In addition, in its 2010 coordinated communications rulemaking, the Commission considered whether to establish a parallel safe harbor for ads run "by certain tax-exempt nonprofit organizations in which Federal candidates and officeholders appear." 75 Fed. Reg. at 55,960. The Commission declined to do so, however, explaining that there "is no significant need" and that the "Commission retains its prosecutorial discretion to dismiss enforcement matters involving such communications." *Id.* (emphasis added).

1 eight months before he became a candidate.¹⁰ Both the Committee and HLTA, in their unsworn
2 responses, make specific assertions that Hannemann never failed to fulfill his responsibilities.
3 *See supra* p. 5. Moreover, the Complaint's allegations that Hannemann did not fulfill his duties
4 or provide the services for which he was compensated are speculative. The allegations are also
5 contradictory, in that they provide evidence of Hannemann's news shows appearances, which
6 indicate that he was working on behalf of HLTA while also a candidate. Finally, the Complaint
7 makes no specific allegation that Hannemann's compensation exceeded the amount that would
8 be paid to any other similarly qualified person for the same work.¹¹ Therefore, we recommend
9 that the Commission find no reason to believe that HLTA, Hannemann, or the Committee
10 violated 2 U.S.C. § 441b(a) by making or accepting a corporate contribution in the form of
11 Hannemann's salary.

12 3. Failure to Properly Report Expenditures

13 a. Travel: Guam Fundraiser

14 Commission regulations provide that campaign-related travel expenses paid for by a
15 candidate from personal funds constitute reportable expenditures. 11 C.F.R. § 106.3(b)(1). The
16 Committee acknowledges that Hannemann traveled to Guam for the purpose of attending a
17 campaign fundraiser and, for that reason, Hannemann paid the airfare costs with his personal
18 miles. *See supra* p. 4. Because the trip appears to be entirely campaign-related, the Committee
19 should have reported the value of the airfare as an expenditure.

¹⁰ *See, e.g.*, Second Gen. Counsel's Rpt. at 11, MUR 5571 (Tanonaka, *et al.*) (Commission took no further action where, among other factors, the contract between the candidate and his employer was ratified more than a year before the candidate announced his candidacy).

¹¹ Although information about the exact amount of Hannemann's compensation is not available, his prior position as the Mayor of Honolulu is relevant to his qualifications for the position. *See, e.g.*, First Gen. Counsel's Rpt. at 19, MUR 5260 (Jim Talent, *et al.*) ("[A]s a former minority leader in the Missouri House of Representatives, a four-term member of the U.S. House of Representatives, and a gubernatorial candidate . . . the fact that he received two-thirds the salary of a full professor does not appear out-of-line.").

1 Commission regulations also provide that an individual, including a candidate, may
2 voluntarily spend up to \$1,000 for unreimbursed transportation expenses on behalf of the
3 campaign without making a contribution. 11 C.F.R. § 100.79. When an individual's payments
4 for such transportation exceed \$1,000 per candidate, per election, the payments in excess of
5 \$1,000 are considered contributions. *Id.*

6 Although the value of Hannemann's airfare from Hawaii to Guam is not provided, it
7 likely exceeded \$1,000,¹² and the Committee should have disclosed that portion exceeding
8 \$1,000 as a contribution from Hannemann. The Committee therefore likely violated 2 U.S.C.
9 § 434(b)(2) and (4) by failing to report the airfare exceeding \$1,000 as a contribution from
10 Hannemann and by failing to report the value of the airfare as an expenditure. Given the *de*
11 *minimis* amount that likely exceeded the \$1,000 threshold, however, we recommend that the
12 Commission exercise its prosecutorial discretion and dismiss these allegations.

13 b. Polling Expenses

14 Commission regulations provide that a written contract, promise, or agreement to make
15 an expenditure is an expenditure as of the date such contract, promise, or obligation is made.
16 11 C.F.R. § 100.112. The regulations also provide, however, that a political committee can enter
17 into an agreement with a commercial vendor that full payment is not due until after the vendor
18 provides the goods or services to the political committee. *Id.* §§ 116.1(e), 116.3(a). This
19 agreement constitutes an extension of credit to the political committee. *Id.* § 116.1(e). Such an
20 extension of credit, when it exceeds \$500, must be reported as of the date on which the
21 obligation is incurred. *See id.* § 104.11.

¹² Based on an internet search on October 4, 2012, roundtrip economy airfare from Honolulu to Guam International Airport ranges from approximately \$1,700 to \$2,700.

1 The Committee appears to have entered such an agreement with QMark: it references a
2 "two-poll package" under which QMark conducted polls in August 2011 and March 2012, and
3 the Committee paid \$5,130.89 each for the polls in March and April 2012. *See supra* p. 5.
4 Because this agreement with QMark constituted an extension of credit over \$500, the Committee
5 should have disclosed its expenditures for these polls as obligations to QMark on the dates on
6 which they were incurred; the Committee violated 2 U.S.C. § 434(b)(8) by failing to do so.
7 Given that the amount in violation is limited,¹³ and because we are not recommending that the
8 Commission pursue any other allegations against the Committee, we recommend that the
9 Commission exercise its prosecutorial discretion and dismiss this allegation.

10 Regarding the allegation that the amounts disclosed for the polls are "under the market
11 value," there is no information — in the Complaint or otherwise — to indicate that the polls cost
12 more than the amounts disclosed by the Committee. The Committee flatly denies the allegation,
13 and the conclusory nature of the allegation does not provide a sufficient basis to expend
14 Commission resources to investigate. Because the Complaint does not specify whether it is
15 alleging failure to properly report a disbursement or acceptance of a prohibited in-kind
16 contribution, we recommend that the Commission dismiss any allegation that the Committee
17 violated 2 U.S.C. §§ 434(b)(4) and 441b(a).

18 c. Credit Card Payments

19 A political committee must disclose payments made to a credit card company as a
20 disbursement. 2 U.S.C. § 434(b)(4). In the case of operating expenditures charged on a credit
21 card, a political committee must itemize a payment to a credit card company if the payment

¹³ Under the *Reports Analysis Division Review and Referral Procedures for the 2011-2012 Election Cycle*, the omission of a debt is considered a missing Schedule D, and thus subject to the per report threshold provided by Standard 7 (Failure to Provide Supporting Schedules).

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1 exceeds the \$200 aggregate threshold for itemization provided in 11 C.F.R. § 104.3(b)(4).
2 Furthermore, the political committee must itemize, as a memo entry, any specific transaction
3 charged on a credit card if the payment to the actual vendor exceeds the \$200 threshold. *See*
4 *Campaign Guide for Congressional Candidates and Committees* at 100-101. The memo entry
5 must include the name and address of the vendor and the purpose and amount of the
6 disbursement. *Id.*

7 The Committee correctly reported most of its credit card transactions on its 2012 April
8 Quarterly Report; it itemized the credit card payments to First Hawaiian Bank that exceeded
9 \$200 and, except for two transactions, itemized the specific transactions on the credit card
10 exceeding \$200. The Committee failed to properly itemize two specific transactions on its credit
11 card payment — \$200.12 to Hula Shores Restaurant and \$297.42 to Hotel Molokai — and thus
12 violated 2 U.S.C. § 434(b)(4). Given the *de minimis* amount involved, however, we recommend
13 that the Commission exercise its prosecutorial discretion and dismiss this allegation.

14 III. RECOMMENDATIONS

- 15 1. Dismiss the allegation that Hannemann for Congress and Colin Ching in his official
16 capacity as treasurer violated 2 U.S.C. § 434(b) by failing to report Hannemann's inter-
17 island travel.
18
- 19 2. Dismiss the allegations that the Hawai'i Lodging & Tourism Association, Mufi
20 Hannemann, and Hannemann for Congress and Colin Ching in his official capacity as
21 treasurer violated 2 U.S.C. § 441b(a) with respect to travel expenses.
22
- 23 3. Dismiss, as a matter of prosecutorial discretion, the allegation that Hannemann for
24 Congress and Colin Ching in his official capacity as treasurer violated 2 U.S.C. § 434(b)
25 by failing to report a travel expenditure to Guam and a related contribution from
26 Hannemann.
27
- 28 4. Find no reason to believe that the Hawai'i Lodging & Tourism Association, Mufi
29 Hannemann, and Hannemann for Congress and Colin Ching in his official capacity as
30 treasurer violated 2 U.S.C. § 441b(a) with respect to press coverage.
31
- 32 5. Dismiss, as a matter of prosecutorial discretion, the allegation that the Hawai'i Lodging &
33 Tourism Association, Mufi Hannemann, and Hannemann for Congress and Colin Ching in

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- 1 his official capacity as treasurer violated 2 U.S.C. § 441b(a) with respect to coordinated
- 2 communications.
- 3
- 4 6. Find no reason to believe that the Hawai'i Lodging & Tourism Association, Mufi
- 5 Hannemann, and Hannemann for Congress and Colin Ching in his official capacity as
- 6 treasurer violated 2 U.S.C. § 441b(a) with respect to Hannemann's salary.
- 7
- 8 7. Dismiss, as a matter of prosecutorial discretion, the allegation that Hannemann for
- 9 Congress and Colin Ching in his official capacity as treasurer violated 2 U.S.C.
- 10 § 434(b)(8) by failing to properly disclose debt.
- 11
- 12 8. Dismiss the allegation that Hannemann for Congress and Colin Ching in his official
- 13 capacity as treasurer violated 2 U.S.C. §§ 434(b)(4) and 441b(a) with respect to polling.
- 14
- 15 9. Dismiss, as a matter of prosecutorial discretion, the allegation that Hannemann for
- 16 Congress and Colin Ching in his official capacity as treasurer violated 2 U.S.C.
- 17 § 434(b)(4) by failing to properly itemize credit card disbursements.
- 18
- 19 10. Approved the attached Factual and Legal Analyses.
- 20
- 21 11. Approve the appropriate letters.
- 22
- 23 12. Close the file.
- 24

25
26
27
28
29 BY:

30 Date

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